No. 08-1085

IN THE

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

ALLISON COOPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THERE IS A MATERIAL CONFLICT AMONG THE CIRCUITS IN THEIR APPROACH TO DETERMINING WHETHER AN ENTITY IS AN ARM OF THE STATE.

The circuit courts use a number of different tests, employ a variety of different factors, and disagree as

to which, if any, factor should be weighed most heavily in determining whether an entity is an arm of the state for purposes of the Eleventh Amendment. And when an entity like SEPTA is run through the various circuits' various tests, its status under the Eleventh Amendment varies by circuit. Duel sovereignty, however, is a fundamental feature of our nation's government. Pennsylvania's intent in creating an element of state government and cloaking it with state sovereign immunity should not be entitled to less weight than Massachusetts' intent to do the same.

According to respondent, however, this conflict is of no moment, because, in respondent's view, "the overarching inquiry in every circuit is the same: Is the relationship between the state and the entity such that a suit against the entity is effectively an action against the state itself." Opp. 22. After reframing the question from that lofty vantage, respondent states her view that "not one of the cases cited by SEPTA suggests that the circuits are having any difficulty applying this Court's arm-of-the-state analysis." *Id.* at 22-23.

Respondent is mistaken. As an initial matter, she does not attempt to address in any substantive way the varying tests the circuits currently employ to determine whether an entity is an arm of the state. *See* Pet. 22-27. Rather, respondent reframes the question at such a uselessly general level—"is a suit against the entity * * * effectively an action against

the state itself"?—that all of the pertinent distinctions between the circuits drop away. True, many of the circuits examine factors that overlap; but the point of this petition is that the circuits differ widely, and results differ widely between circuits, depending on the application and the weight accorded to each of those factors. *Id.* Those differences are material.

For example, the First Circuit begins its analysis by asking whether the State structured the entity to share its sovereignty. *See Fresenius Med. Care Cardiovascular Res. Inc.* v. *Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 68 (1st Cir.), *cert. denied*, 540 U.S. 858 (2003). *Only if* the answer to this inquiry is ambiguous does that court go on to consider other factors. *Id.* at 65-68. The First Circuit's approach pays deference to the State's dignity by recognizing the sovereign's interest in structuring elements of its own government. Had the First Circuit's approach held sway in this case, the result would have been different. The Commonwealth of Pennsylvania unambiguously structured SEPTA as a Commonwealth agency entitled to sovereign immunity. *See* 74 Pa.C.S. §§ 1711(a)&(c)(3). And the Pennsylvania Supreme Court explicitly confirmed SEPTA's status. *Feingold* v. *SEPTA*, 517 A.2d 1270, 1276 (Pa. 1986) ("we have no hesitation in concluding that SEPTA was intended to be considered an agency of the Commonwealth"). While the Third Circuit found that SEPTA's status under state law only weighed

"slightly" in favor of immunity, Pet. App. 27a, under the First Circuit's approach, SEPTA would likely be found to be an arm of the state.

Similarly, the varying approaches to, and weight placed on, the "state treasury" factor, when applied to SEPTA, yield different conclusions. The Seventh Circuit, for example, emphasizes the *practical* impact on the state treasury of a judgment; the Third Circuit focused on actual legal liability. Compare *Peirick* v. *Indiana Univ.-Purdue Univ./Indianapolis Athletics Dep't*, 510 F. 3d 681, 695-96 (7th Cir. 2007) with Pet. App. 17a. SEPTA receives hundreds of millions of dollars annually from the Commonwealth—including increased appropriations in each of the last three years to close a structural operating deficit. Pet. 3-5. SEPTA accordingly would likely be considered an arm of the state under the Seventh Circuit's approach. Under the Third Circuit's test, however, SEPTA was not. *See* Pet. App. 17a. Again, the difference in likely results among circuits points up a material difference among the circuits' tests.

Respondent's statement that "not one of the cases cited by SEPTA suggests that the circuits are having any difficulty applying the Court's arm-of-the-state analysis" is similarly puzzling. Opp. 22-23. This Court *itself* recognized in *Hess* the problem this petition identifies:

> The Court wisely recognizes that the six-factor test set forth in *Lake County, supra*, ostensibly a balancing scheme, provides meager guidance for lower courts when the factors point in different directions. Without any indication from this Court as to the weight to ascribe particular criteria, the Courts of Appeals have struggled variously adding factors * * * distilling factors * * *, and deeming certain factors dispositive. [*Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 59 (1994) (O'Connor, J., dissenting) (internal citations omitted)].

See Pet. 11, 28 (citing *Hess* for this proposition). And several circuit courts since *Hess* have specifically noted the confusing nature of the arm-of-the-state test. *See Mancuso* v. *New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused."); *Gray* v. *Laws*, 51 F.3d 426, 431 (4th Cir. 1995) (characterizing *Hess* as "an opinion that is certain to generate confusion"). *See* Pet. 28 (citing to these decisions).

The federal circuits' application of the arm-of-the-state doctrine presently is a baffling stew of factors and subfactors—some invoked more often and more strongly in some circuits than others, some emphasized in some circuits and ignored in others—

that result in an entity being entitled to immunity in some circuits while being denied immunity in others. A more uniform and orderly approach is required to the arm-of-the-state issue. And this case presents an ideal vehicle to devise such an approach.

II. RESPONDENT DISTORTS SEPTA'S POSITION ON THE PROPER APPLICATION OF THE ARM-OF-THE-STATE DOCTRINE.

Respondent suggests that SEPTA is attempting to radically alter the arm-of-the-state analysis by advocating that SEPTA's status under state law should be definitive. Opp. 15-16. From that faulty premise, respondent next contends that this Court's decision in *Howlett* v. *Rose* fatally undermines SEPTA's position. *Id.* at 17-19.

To be clear: SEPTA is not contending, and did not contend in its petition, that *state law determines* whether an entity is entitled to Eleventh Amendment immunity as an arm of the state. *See* Pet. 20 (noting that "Eleventh Amendment immunity is a question of federal law"). Rather, as SEPTA explained in its petition, federal law *looks to state law* in defining the agency's character. *Id.* at 19-20.[1]

[1] *See Regents of Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 & n.5 (1997) (noting that while Eleventh Amendment immunity is a question of federal law, "that federal question can be answered only after considering the provisions of state law that define the agency's character.")

Where, as here, the State's highest court has recognized that SEPTA is a Commonwealth agency entitled to sovereign immunity, that determination should be definitive as to that factor.

Respondent's contention that SEPTA's argument was rejected in *Howlett* v. *Rose* flows directly from her mistaken premise that SEPTA is seeking to impose state law on a federal question. *Howlett* addressed whether state or federal law applied to defenses to federal claims brought in state courts, and concluded that federal law applied in those circumstances. *See* 496 U.S. 356, 358 (1990). But *Howlett* does not address the issue raised by SEPTA here, *i.e.*, when applying federal law, what deference should a federal court afford determinations of state law by the State's highest court on the character of a state agency? Here, despite multiple specific determinations that SEPTA is a Commonwealth agency entitled to sovereign immunity by Pennsylvania's Supreme Court, the Third Circuit concluded that all of those pronouncements weighed only "slightly" in favor of immunity. Pet. App. 27a. This Court's teachings on federalism and comity dictate otherwise.

SEPTA's status under state law is, put simply, more than "slightly" relevant to the arm-of-the-state determination under federal law. The Third Circuit's test places far too much emphasis on ultimate financial liability while marginalizing the intent of the sovereign and the practical

ramifications of a judgment on the Commonwealth's treasury. Pet. 17-18. The lower court's approach thus ignores this Court's teaching in *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002), that the "preeminent purpose" of the sovereign-immunity inquiry is to protect the state's dignity interest as a sovereign. The state's dignity interest is undermined when federal law gives unduly short shrift to the will of the sovereign in creating and characterizing elements of state government. And the Third Circuit's test similarly runs afoul of this Court's pronouncement in *Hess* that where the factors point in different directions, the court should be guided by the twin reasons for the Eleventh Amendment: protecting against threats to the state's dignity interest as well as the effect of a judgment on the state treasury. 513 U.S. at 47.

III. RESPONDENT'S REMAINING ARGUMENTS ARE BOTH IRRELEVANT AND MERITLESS.

Respondent accuses SEPTA of a series of alleged misstatements and exaggerations that she claims warrant denying the petition. Opp. 8-15. Such contentions are not only irrelevant and distracting from the legal question presented here; they also are meritless.

First, respondent argues that that the Third Circuit's decision arose out of a motion for summary

judgment. Opp. 9-10. SEPTA's motion to dismiss was converted to one for summary judgment because it included materials other than the complaint itself. Pet. 3a. That the legal issue here was resolved on summary judgment is irrelevant; SEPTA is challenging the legal standards the Third Circuit used to assess sovereign immunity. *That* legal issue is a proper question for this Court's intervention; the circuits are in deep conflict about it and are calling for this Court's guidance.

Respondent also takes factual issue with SEPTA's description of its financial status. Opp. 10. Her factual critique is misplaced; and she in any event does not (and cannot) contest that SEPTA receives hundreds of millions of dollars annually from the Commonwealth or that in each of the last three years the Commonwealth was forced to provide additional state monies to close SEPTA's structural operating deficit. These undisputed facts form the foundation of SEPTA's argument with respect to the Commonwealth's practical obligation to SEPTA—and the impact on the Commonwealth's treasury of a judgment against SEPTA. Pet. 16-18.

Respondent similarly argues that SEPTA has understated the degree of its own autonomy. Opp. 13. But the fact that SEPTA can raise fares does not change the fundamental fact that SEPTA was intentionally structured by the Commonwealth to require substantial government resources to fund its operating revenue. Pet. 3-4. In fact, SEPTA is

identical in this respect to the interstate transit system this Court concluded in *Hess* was *entitled* to Eleventh Amendment immunity. 513 U.S. at 49-50.

SEPTA's petition identifies a pure legal issue: the factors to be considered and the weight to accord those factors in determining whether an entity is entitled to sovereign immunity as an arm of the state. The issue is timely, as states across the nation contend with sharply constrained budgets—and sharply heightened demands for state services. The issue has divided the courts, as this Court and others previously have observed. The issue is worthy of this Court's close attention, and certiorari should be granted.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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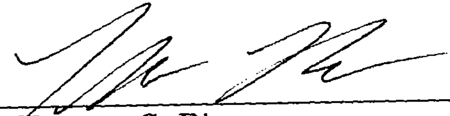
CERTIFICATE OF COMPLIANCE

I, Thomas S. Biemer, a member of the Bar of this Court, hereby certify under Supreme Court Rule 33.1(h) that the reply brief for petitioner on petition for a writ of certiorari contains 1,908 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).



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CERTIFICATE OF SERVICE

I, Thomas S. Biemer, a member of the Bar of this Court, hereby certify that on this 11th day of May, 2009, three copies of a Reply Brief for Petitioner were served by first-class United States mail, postage prepaid, to:

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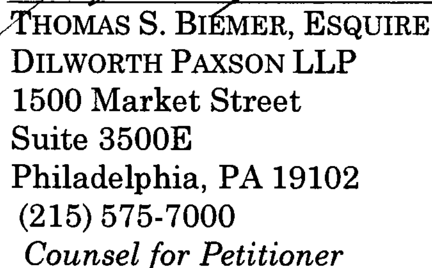

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BY MESSENGER

Honorable William K. Suter
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Re: Southeastern Pennsylvania Transportation Authority v. Allison Cooper, et al., Case No. 08-1085

Dear General Suter:

Enclosed for filing in the above-referenced matter are forty copies of a Reply Brief for Petitioner and the requisite Certificates of Compliance and Service. Also enclosed are extra copies of the Reply Brief and Certificates to be file-stamped and returned.

Thank you for your kind assistance.

Sincerely,

Catherine E. Stetson

2009 MAY 11 A 5:29

Enclosures

cc: All Counsel